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THE MOTION FOR NEW TRIAL BASED ON INADEQUACY OF DAMAGES AWARDED

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This article represents an attempt to state the law governing the establishment of an inadequate verdict, the basic requirements in proving such a verdict and to suggest the policy considerations which should be controlling in this area.

I. INTRODUCTION

While the term has recently acquired substantial emotional overtones by reason of its use in the controversy over what some writers allege is the inadequate level of jury verdicts in negligence cases, an "inadequate verdict" in the sense the term is employed here exists when the verdict returned is for an amount less than the smallest sum to which plaintiff has shown himself entitled if defendant is found liable, as where plaintiff's uncontested pecuniary losses are $10,000 and the jury brings in a verdict for only $5,000. Excluded from this discussion are those cases where the verdict, while small, can nevertheless reasonably be sustained in terms of the evidence.

Theoretically inadequate verdicts can and sometimes do result from juror prejudice against plaintiff or against the nature of his lawsuit, from sympathy for defendant, from a simple inability of the jurors to add or from a misunderstanding of the applicable legal rules. However, the fact that the vast majority of inadequate verdict cases found involve extremely close liability questions clearly illustrates that the most important cause of the inadequate verdict lies in the widespread tendency of jurors to reduce the amount of plaintiff's award because of a general uncertainty over defendant's liability or as a means of compromising their differences on defendant's liability. Indeed, it can fairly be said that the inadequate verdict cases have furnished the courts with about their only realistic opportunity for putting teeth into

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the principle that liability and damage considerations are to be kept separate. Under present practice, except for extraordinary situations, juries must decide liability and damage questions at the same time and jurors may not be questioned as to the basis for their verdict. Short of changing the law in one or both of these respects, there is no way of preventing jurors from compounding liability and damage considerations unless it is to be in the inadequate verdict situation where the verdict, on its face, gives a plainly justifiable ground for inferring that a compromise has resulted. An examination of the court's handling of the inadequate verdict cases, apart from providing a much needed sketch of a complicated area of civil procedure, will also provide important clues concerning actual judicial attitudes toward juries and compromise verdicts.

Formulated rules concerning the handling of inadequate verdicts are many and varied and vast differences exist not only among the states but between the state and federal courts. Distinctions, furthermore, abound. Much may or at least should depend, for example, on whether we are dealing with an inadequate verdict which is merely nominal or one which, though inadequate, is nevertheless substantial. Failure to draw this distinction has in the federal system at least occasioned much needless confusion and injustice. Differences exist also depending on which party, plaintiff or defendant, objects to the inadequacy and sometimes on the state of the evidence as to liability. There is likewise an important question of waiver and of the proper nature of the relief to be given from an inadequate verdict; whether it is to be a complete new trial, a new trial on the issue of damages only or perhaps a judicially ordered increase in the verdict, commonly known as an additur. The various distinctions are noted and suggestions made concerning the direction the law should take in these various areas. At the outset, however, a brief historical word.

II. HISTORY

A. In General

The problems implicit in a motion for new trial on the ground of a verdict's inadequacy are not confined to the United States alone. The early English common law did not permit a new trial on the ground of a verdict's *inadequacy* or *excessiveness* under any circumstances.[1] It was felt that in tort actions in particular

[1] Review was denied because of the historical limitation of the writ of error to matters within the record, of which the motion for a new trial

there was no scale upon which to weigh the damages other than the intelligence of the jury. The jury was a favorite and almost sacred tribunal and the law favored the presumption that jurors acted on pure motives. A solemn trust of this nature could not be dispensed with by the granting of a new trial. At an early date, however, the English courts recognized a distinction between *excessive* and *inadequate* verdicts and began to allow a new trial where the damages were grossly excessive and there was an obvious "miscarriage of jurors."[2] This early distinction has now been removed in England and a new trial will be granted where the verdict is so small as to be out of all proportion to the facts.[3]

This early English distinction between excessive and inadequate verdicts likewise worked its way into early American jurisprudence in the form of statutes expressly forbidding the granting of new trials for inadequacy of the verdict.[4] In contrast, new trials for excessiveness of the verdict were freely granted in the United States from the beginning.[5] The basis for the distinction, while shrouded in history, 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, when rendered by a jury, were not such

was not a part. See 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 226 (7th ed. 1956). The right of trial by jury was characterized by Blackstone as "the glory of the English law." 3 BLACKSTONE'S COMMENTARIES 378 (4th ed. 1876). For these reasons the early English courts were slow to grant new trials under any circumstances.

[2] The first English case found is Wood v. Gunston, Style 466 (1655) which granted a new trial for an excessive verdict in a slander case. Glyn, C. J. stated: "it is frequent in our books for the court to take notice of miscarriages of jurors, and to grant new trials upon them."

[3] By 1879 a new trial was granted in England where the motion was founded upon the verdict's inadequacy. Phillips v. London & South Western Rail Co., 5 Q.B.D. 78, C.A. (1879). In accord: Price v. Glynea and Castle Coal and Brick Co. Ltd., 86 L.J.K.B. 1278, C.A. (1915), Smith v. Schilling, 1 K.B. 429, C.A. (1928) and see: 30 HALSBURY'S LAWS OF ENGLAND § 890 (3rd ed. 1959).

[4] An example of such a limitation was found in the Washington statute, *since repealed.* Laws of 1869, Ch. XXII *New Trial* § 279: "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained." The usual procedure was to make excessive verdicts a specific ground for new trial while omitting a provision for inadequate verdicts. OKLA. STAT. ANN. tit. 12, § 651 (4) (1937).

[5] Sampson v. Smith, 15 Mass. 365 (1819) and Rowland Lumber Co. v. Ross, 100 Va. 275, 40 S.E. 922 (1902).

terrible things after all. The early statutes precluding relief for inadequacy of the verdict began to disappear early in the 19th century and have now entirely disappeared. It is worthy of note that Kentucky and Oklahoma steadfastly fought the repeal trend for approximately one and one-half centuries.[6]

It is now everywhere settled that an inadequate verdict, may, *in an appropriate case*, be set aside. Exactly what is meant by an *appropriate case*, however, differs markedly from one jurisdiction to another and is sometimes difficult to determine within a single jurisdiction. The many distinctions drawn in the various states will be discussed subsequently.

Although state court rules concerning inadequate verdicts differ markedly from one state to another, they are, for the most part, fairly specific within each jurisdiction. This is far from the case in the federal system. The most important difference between federal and state law in this area is that state appellate courts have formulated a body of complex rules and principles governing the situations in which state trial judges can and cannot award a new trial for inadequacy of the verdict. In contrast to this body of rules federal appellate tribunals have done almost nothing to guide federal district judges in ruling upon new trial motions based upon this ground. Federal trial judges have long had almost unlimited discretion in *granting*, as opposed to *denying*, new trials on the ground of inadequate damages and federal appellate courts have only recently begun formulating rules covering those situations where a new trial *must be granted* for a verdict's inadequacy. A detailed analysis of the federal law will be undertaken after the state decisions are reviewed.

[6] The Kentucky limitation has been replaced with KEN. RULES CIV. PROC., Rule 59.01 (4) which was adopted in 1953 and provides that a new trial may be granted in the case of either an excessive or inadequate verdict. The case of Smith v. Bailey, 311 Ky. 118, 223 S.W.2d 582 (1949) has interpreted this new rule as requiring that the verdict must strike the mind "at first blush as being a result of passion, prejudice, or mistake." The Oklahoma limitation was also removed in 1953 when OKLA. STAT. ANN. tit. 12, § 652 (1937) was repealed and OKLA. STAT. ANN. tit. 12, § 651 (4) (Supp. 1953) was changed to include inadequate as well as excessive verdicts. However, even before the 1953 change the Oklahoma Supreme Court seemed to be leaning heavily in favor of granting a new trial for inadequacy when it stated, in Spence v. Park, 207 Okla. 215, 248 P.2d 1000 (1952), that the statute would only be applicable "when the record is wholly free from irregularities or erroneous rulings of the court which might have resulted in the inadequate verdict." A careful reading of the opinion reveals that the major ground for sustaining the granting of the motion for new trial was that of smallness of damages.

B. WAIVER

Before turning to the mainstream of the inadequate verdict case law, a substantial preliminary question presents itself for disposal. This is the question of whether a litigant failing to object to a verdict's inadequacy when the verdict is rendered thereby waives his right to subsequently raise the question, whether by a motion for a new trial or otherwise. In view of the nature of the question posed, the paucity of cases discussing the question is surprising. Especially is this so in view of the fact that the so-called "waiver rule" as applied to jury verdicts defective in other respects has had a long and productive history as a new trial preventer. The "waiver rule" has been conclusively offered as an answer to motions for a new trial based on the ground that the verdict has not been signed,[7] or that it has been signed improperly,[8] or that there was error in the amount of the verdict with respect to interest,[9] and in a great variety of other situations.[10]

It has, however, simply been assumed in the vast bulk of the inadequate verdict cases that a litigant who is entitled to object to the verdict's inadequacy may raise the question for the first time by means of a motion for new trial. Only two cases have been found discussing the waiver question, *Wall v. Van Meter*[11] and *Fischer v. Howard*,[12] Kentucky and Oregon cases respectively. The *Wall* case holds that an inadequate personal injury verdict, limited to the exact sum shown by the evidence to have been expended for medical treatment and awarding nothing for pain and suffering, should have been set aside as invalid notwithstanding plaintiff's failure to object to its receipt at the time of the trial and before the jury was discharged. The court drew a distinction between "mere irregularities" in the verdict, which are

[7] Rucker v. Cox, 200 Ark. 247, 138 S.W.2d 778 (1940) and Northern Pacific Railway Co. v. Urlin, 158 U. S. 271 (1894) where the jury foreman failed to sign the verdict although a Montana statute required his signature.

[8] Old 76 Distillery Co. v. Morris, 234 Ky. 389, 28 S.W.2d 474 (1930).

[9] Nichols & Shepard Co. v. Steinkraus, 83 Neb. 1, 119 N.W. 23 (1908).

[10] See 89 C.J.S. Trial § 525 (1955), for a complete discussion of many other situations where a failure to object before discharge of the jury will amount to waiver.

[11] Wall v. Van Meter, 311 Ky. 198, 223 S.W.2d 734 (1949).

[12] Fischer v. Howard, 201 Ore. 426, 271 P.2d 1059 (1954).

waived by failure to object, and "invalid verdicts," to which no such objection is necessary.[13]

The Oregon court, in *Fischer v. Howard,*[14] however, took a different view. *Fischer* was an action to recover damages for two separate assaults and batteries, plaintiff's evidence showing that he sustained pecuniary losses of over $25.00 as a result of the first affray and of $335.00 on account of the second. The jury returned a verdict for plaintiff on both causes of action, awarding him "$0" damages on the first and only "$35.00" on the second. A divided Oregon Supreme Court, in an opinion by Judge Rossman, reversed the trial court's ruling granting plaintiff a new trial because of the verdict's inadequacy, holding that plaintiff had waived his rights by failing to object to the verdict and request the issue be re-submitted to the jury. The Oregon Court also held that the plaintiff could not raise the question of inadequacy for the first time upon a motion for a new trial. Plaintiff's right to a new trial had he objected before dismissal of the jury was conceded.

The answer to the waiver problem appears to lie in the unfairness involved in requiring a litigant, in the heat of a trial, to insist upon a re-submission of the question to a jury which has already demonstrated its inability to reach an agreement within the bounds of adequacy. Whether or not such a question should, at any time, be re-submitted to the jury for further deliberations is most certainly doubtful. The following observations of the New Jersey Courts in opinions dealing with analogous situations seem quite pertinent:

> After a finding that the first verdict of a jury is so tainted, we think it very questionable whether substantial justice can be accomplished by permitting such a jury, on reconsideration, to settle the rights of the parties.[15]
>
> [A] body of men so disregardful of the obligation resting upon them should not be permitted to settle the rights either of the plaintiff or the defendant.[16]

Another practical problem involved in the waiver area is that a rule requiring a re-submission of the case to the jury might,

[13] Wall v. Van Meter, *supra* note 11, at page 736. See 89 C.J.S. *Trial* § 525 (1955) where cases illustrating this distinction are collected.

[14] *Supra* note 12.

[15] Elvin v. Public Service Coordinated Transp., 4 N.J. Super. 491, 67 A.2d 889 (1949). The case was reversed and a new trial ordered.

[16] Faggoni v. Weiss, 3 N.J. Misc. 370, 128 A. 540 (Sup. Ct. 1925).

in all probability, result in a substitution of the judge's opinion for that of the jury. If the judge orders the case to be re-submitted there is a definite possibility that the amount of the increase will be determined after careful consideration, by the jury, not of the evidence but of how far the *judge* feels they are from an "adequate verdict."

In concluding this section it must be emphasized that this discussion deals only with the situation where a *complete* new trial is contemplated and where the litigant subject to the waiver is unquestionably entitled to a new trial in the absence of the waiver.

III. NOMINAL VERDICTS VS. SUBSTANTIAL THOUGH INADEQUATE, VERDICTS

Let us now turn to the major configurations of the case law in this area. Perhaps the most basic distinction is between the merely nominal verdict and a verdict which, though inadequate, is nevertheless substantial. Briefly the distinction is this: A nominal verdict is one which is not only inadequate but so palpably inadequate with relation to the evidence as to plaintiff's actual damages as to show that no honest attempt was made to assess the damages against defendant. The substantial though inadequate verdict, on the other hand, typically involves a compromise verdict in which the liability and damage aspects of the case have been illicitly compounded.[17] State court nominal verdict cases will be discussed first after which substantial though inadequate verdict cases will be considered. Federal law will then be examined.

A. Nominal Verdicts in General

If the reported decisions are any criterion, the propensity of juries to return nominal verdicts in disregard of the evidence as to plaintiff's damages is only slightly less than the instances in which their awards, though substantial, are nonetheless "clearly inadequate." Verdicts for one cent,[18] six cents,[19] one dollar,[20]

[17] The term compromise verdict, as used here, refers to a situation where the jury has obviously compromised the *liability* aspects of the case with the *damage* issues, hence, never making a clear decision on liability. Not included are those cases, often called compromise verdicts, where, although liability is certain, the jurors compromise their true feelings upon damages only.

[18] Haven v. Missouri Ry. Co., 155 Mo. 216, 55 S.W. 1035 (1900) and Davis v. Whitmore, 43 Ariz. 454, 32 P.2d 340 (1934).

and "no or none"[21] damages have been popular. Excluded from this discussion are those cases where it is inherently improbable that plaintiff did, in fact, sustain any damages and the nominal verdict can be reasonably sustained in terms of the evidence.

Unlike substantial though inadequate verdicts, defendants are almost invariably willing, if not eager, to acquiese in nominal verdicts. This type of a verdict will seldom, if ever, equal the cost of a subsequent new trial and the only time a defendant might find it necessary to overturn a nominal verdict would be when he was interested in gaining a favorable appellate court ruling on an important point of substantive law. This type of a situation, of course, is exceedingly rare. However, in some of those cases where defendant does appeal, it has been held that defendant has no right to complain of a verdict for the plaintiff in an amount less than plaintiff was entitled, since the verdict is regarded as conclusively establishing that the defendant had been found liable.[22] This type of reasoning overlooks the very obvious probability that the jury found for defendant, but, out of sympathy for plaintiff, wished the costs of the trial taxed to defendant. It takes no unusual stretch of the imagination to arrive at the conclusion that a nominal verdict is, in essence, a finding for the defendant.[23] Failure to employ a little imagination can in some cases result in clear injustice. In libel and slander actions for example, defendant should clearly be allowed an opportunity to overturn the verdict and point out the probability that such a verdict is actually a finding for his position.

The bulk of the litigation in this area deals with plaintiff's right to have a nominal verdict set aside. One group of cases, perhaps a majority, holds that such a verdict must be regarded as a perversely-expressed finding for the defendant which cannot be set aside unless, of course, the trial court could properly have

[19] Brown v. Wyman, 224 Mich. 360, 195 N.W. 52 (1923) and Fleming v. Gemein, 168 Mich. 541, 134 N.W. 969 (1912). Of interest also is Bradwell v. Railway Co., 139 Pa. 404, 20 Atl. 1046 (1891) where the verdict was for "6½ cents."

[20] Miller v. Miller, 81 Kan. 397, 105 Pac. 544 (1909) and Snyder v. Portland Ry., Light & Power Co., 107 Ore. 673, 215 Pac. 887 (1923).

[21] McLean v. Sanders, 139 Ore. 144, 7 P.2d 981 (1932) and Fischer v. Howard, supra note 38, Klein v. Miller, 159 Ore. 27, 77 P.2d 1103 (1938).

[22] Keicher v. Michaal, 196 Wis. 305, 220 N.W. 179 (1928) and Malden Trust Co. v. Perlmuter, 278 Mass. 259, 179 N.E. 631 (1932).

[23] Snyder v. Portland Ry., Light & Power Co., 107 Ore. 673, 215 Pac. 887 (1923) and cases cited therein.

done so if the verdict had "in form" been for defendant.[24] The jury's error, in other words, is presumed to be one of expression rather than from a mistake or from any doubt that defendant was not liable. This is obviously designed to permit defendant the advantage of what in all probability represents a finding in his behalf on liability, to save the expense of a new trial and to prevent plaintiff from getting a second bite at the apple. Although this theory appears to be the majority rule throughout the states it should be noted that state appellate courts often base their decisions on a variety of reasons such as whether or not the evidence concerning liability preponderates in favor of plaintiff or defendant or whether it is evenly balanced. The extent to which these distinctions are recognized within each jurisdiction will be discussed subsequently.[25]

Giving even more force to the majority rule is the unlikelihood that twelve jurors, after deciding that defendant was liable, would, apart from some highly unusual circumstances, then award but nominal damages. A further argument for calling such a verdict one in favor of defendant is that a nominal verdict could not often be the result of a compromise as it would exhibit a virtually complete defeat for the pro-plaintiff forces. Assuming that there are such pro-plaintiff forces a nominal verdict would seem highly unlikely. These presumptions should also be equally applicable in support of the view that verdicts for "none" or "no" damages should be construed as verdicts for defendant. However, there is a sharp division of opinion on this last point due mainly to judicial interpretations of statutes providing that "where the jury find for plaintiff they must also assess the amount of his damages."[26] These opinions are so anomolous that in the case of at least one jurisdiction it is held a reversible abuse of discretion for the trial judge to set aside a nominal verdict of $1.00 and to refuse to do so where the verdict is for "none" damages, though the difference, as the distinguished dissenting judge pointed out, is "only $1.00."[27]

[24] Rubinson v. Des Moines City Ry. Co., 191 Iowa 692, 182 N.W. 865 (1921), Haney v. Cheatham, 8 Wash.2d 310, 11 P.2d 1003 (1941) and Snyder v. Portland Ry., Light & Power Co., *Supra*, note 23.

[25] *Infra*, page 708.

[26] Goyne v. Tracy, 94 Ore. 216, 185 P. 584 (1919) based on § 5-405, O.C.L.A., OREGON REV. STAT. 17.425 (formerly § 2-405 Oregon Code of 1930) and McLean v. Sanders, 139 Ore. 144, 7 P.2d 981 (1932).

[27] Klein v. Miller, 159 Ore. 27, 77 P.2d 1103, 1108 (1938) where Judge Rossman, in dissent, stated: "The difference is not one of principle—

It must be emphasized, however, that a nominal verdict must, under some circumstances, be set aside even in jurisdictions employing the rule that such a verdict is a perversely-expressed finding for the defendant. This is the case whenever plaintiff would have been entitled to a new trial if the verdict had "in form" been for defendant. As a nominal verdict is to be regarded as a finding for defendant, any other result would be absurd. Thus, it is uniformally held in these jurisdictions that a nominal verdict must be set aside and a new trial granted whenever the evidence as to defendant's liability preponderates in plaintiff's favor such that plaintiff would have been entitled to a new trial had the jury "formally" found for defendant.[28] However, these cases do not yet make it clear whether plaintiff is entitled to a new trial as a matter of law or whether his right to receive one rests in the exercise of the trial court's discretion.

In marked contrast to the view that a nominal verdict is a verdict for defendant a second group of cases holds firmly to the technical and unrealistic position that such a verdict conclusively establishes the liability of the defendant. Under this view a nominal verdict must be set aside on plaintiff's motion even where the evidence as to defendant's liability preponderates in defendant's favor.[29] The basis for these holdings is that a nominal verdict is "perverse" and "farsical" and would, if allowed to stand, denature the law and encourage irresponsibility on the part of jurors.[30] Ignored is the injustice done to defendant and the fact that the very "perverseness" relied upon to set aside the verdict rests on the notion that the jury actually found for plaintiff and then arbitrarily refused to award substantial damages. As al-

the difference is $1." It should be noted, however, that Klein v. Miller was reversed, in part, by Fischer v. Howard, 201 Ore. 426, 271 P.2d 1059 (1954), although it is not readily apparent which part of the Klein opinion was actually over-ruled. Those jurisdictions which hold that a verdict for "none dollars" is also a finding for the defendant are represented by the frequently cited case of Royal Indemnity Co. v. Island Lake Tp., 177 Minn. 408, 225 N.W. 291 (1929).

[28] Dowd v. Westinghouse Air-Brake Co., 132 Mo. 579, 34 S.W. 493 (1896). Haven v. Missouri Ry. Co., 155 Mo. 216, 55 S.W. 1035 (1900) and cases cited in note 24 *supra*. All recognize the principle that a new trial will be granted where plaintiff would have been entitled to a new trial had the jury formally found for defendant.

[29] Chouquette v. Southern Elect. R. Co., 152 Mo. 257, 53 S.W. 897 (1899); Bracken v. Champlin, 114 Kan. 882, 220 Pac. 1027 (1927); DeMoss v. Brown Cab. Co., 218 Iowa 77, 254 N.W. 17 (1934) and Cosgrove v. Fogg, 152 Me. 464, 54 A.2d 538 (1947).

[30] Brown v. Wyman, 224 Mich. 360, 195 N.W. 52 (1923).

ready mentioned, this is almost never the case and such verdict is, in fact, probably a finding for the defendant combined with a method to relieve plaintiff of paying the costs. The perverse conduct involved in the nominal verdict situation seems to be much less than that involved in the typical substantial though inadequate verdict case where damages are reduced because of doubts over defendant's liability. Furthermore, a few jurisdictions have gone so far as to take the view that while a trial judge may ordinarily refuse to allow a new trial in the substantial though inadequate case, such refusal in the nominal verdict case constitutes a reversible abuse of discretion.[31] The jury in the former situation is regarded as having "honestly" compromised their doubts or differences over defendant's liability, while, in the latter, of finding for plaintiff and then "dishonestly" and "perversely" refusing to award substantial damages. If either verdict is allowed to stand it should, most certainly, be the latter.

A third group of nominal verdict cases holds that the granting or refusal of plaintiff's motion for a new trial is a matter almost entirely within the discretion of the trial court.[32] The trial court is left to determine whether the verdict is a perversely-expressed finding for the defendant or a finding for plaintiff with an arbitrary refusal to award damages. This is particularly true where the evidence as to defendant's liability is evenly balanced, or, as some of these courts have said, "conflicting," such that a verdict for either litigant would be supported by "substantial evidence".[33] Significantly, however, even in this situation most of the cases have arisen out of the trial court's refusal to grant a new trial rather than where a new trial has been granted. Authority can be mar-

[31] See Meier v. Bridgeport Irrig. Dist., 113 Neb. 344, 203 N.W. 543 (1925) where a $1 verdict was set aside and McGrew Mach. Co. v. One Spring Alarm Clock Co. 124 Neb. 93, 245 N.W. 263 (1932) where a $1000 verdict, probably the result of a compromise, did not warrant a new trial. In Sellers v. Mann, 113 Ga. 643, 39 S.E. 11 (1901) a new trial was ordered where the verdict was merely for "nominal damages" and Cox v. Nix, 87 Ga. App. 837, 75 S.W.2d 331 (1953) where the plaintiff suffered a miscarriage and was still under doctor's care one year after the accident. The verdict of $200 was not set aside. However, it should be noted that Georgia is a comparative negligence jurisdiction.

[32] Davis v. Whitmore, 43 Ariz. 453, 32 P.2d 340 (1934); Sullivan v. Wilson, 283 S.W. 743 (Mo. App. 1926); Fischer v. City of St. Louis, 189 Mo. 567, 88 S.W. 82 (1905).

[33] Sullivan v. Wilson, 283 S.W. 743 (Mo. App. 1926) and Fischer v. City of St. Louis, 189 Mo. 567, 88 S.W. 82 (1905). (Nominal verdict set aside).

shalled in support of the general proposition that the trial court always has much more discretion in granting than in refusing a new trial.[34] The very important question of what constitutes an "abuse of discretion" is seldom discussed. Presumably, however, a trial judge would not be allowed to grant a new trial where the evidence as to liability preponderates for defendant,[35] or conversely, deny a new trial where the evidence preponderates for plaintiff.[36]

The fourth and last group of nominal verdict cases is distinguished by a failure to follow any consistent policy. The cases in Iowa,[37] for example, are irreconciably in conflict, sometimes following the rule that a nominal verdict must be regarded as a verdict for the defendant and sometimes discarding it in favor of the policy that the granting or refusing of a new trial is discretionary with the trial court. The Iowa court in *Mendenhall v. Struck*,[38] for example, after citing a host of indistinguishable cases to the effect that a nominal verdict must be regarded as a verdict for defendant, noted, without explanation, that "(a) 'no damage' verdict cannot be viewed as a verdict for naminal damages,"[39] and accordingly refused to do so.

Two important questions remain to be discussed: (1) whether, when a nominal verdict is set aside, the new trial may, under some circumstances, properly be confined to the question of damages alone; and (2) how it is to be determined, in those cases where the verdict is for more than a few dollars, whether it is for nominal or substantial damages and which rules should be applied.

The first question may be disposed of briefly for there is no indication in any of the cases that the question of a partial new trial depends other than upon the principles which apply when

[34] Gilbert v. Kinnaird, 229 Iowa 141, 294 N.W. 272 (1940).

[35] Haffner v. Cross, 116 W. Va. 562, 182 S.E. 573 (1935) which was a verdict for $25.

[36] Cochran v. Mitchem, 143 Ga. 35, 84 S.E. 127 (1915), Snyder v. Portland Ry., Light & Power Co., 107 Ore. 673, 215 Pac. 887 (1923) and Rawle v. McIllhenny, 163 Va. 735, 177 S.E. 215, 221 (1934).

[37] Ruby v. Lawson, 182 Iowa 1156, 166 N.W. 481 (1918), Cogley v. Chicago, B. & Q. Ry. Co., 185 Iowa 1080, 171 N.W. 745 (1919) where the dissenting justice discussed the irreconcilable conflict between the Ruby and Cogley decisions. See also: Rubinson v. Des Moines City Ry. Co., 191 Iowa 692, 182 N.W. 865 (1921).

[38] Mendenhall v. Struck, 207 Iowa 1094, 224 N.W. 95 (1929).

[39] *Id.* 224 N.W. 98.

the verdict is for substantial though inadequate damages. Courts adhering to the view that a nominal verdict conclusively establishes the liability of the defendant, for the purposes of determining whether plaintiff is entitled to a *complete* new trial, have occasionally granted a new trial confined solely to the question of damages.[40] However, the question of a new trial on the issue of damages alone will be discussed in substantial detail in another portion of this paper.

The question of whether a particular verdict is nominal or substantial though inadequate presents a much greater problem. Those cases which raise and discuss the question of whether particular inadequate verdicts are for "substantial" or "nominal" damages are, to say the least, conflicting. In some jurisdictions, where both kinds of verdicts are regarded as automatically entitling plaintiff to a new trial, the question is immaterial. However, this question must be occasionally met and decided.

The term "nominal verdict" has ordinarily been used with reference to any inadequate verdict which is so inadequate with regard to the evidence as to plaintiff's damages as to show that no attempt whatever was made to assess damages. It is not unexpected that a few decisions may characterize obviously substantial verdicts as nominal while others hold obviously nominal verdicts to be substantial.[41] However, the substantial though inadequate verdict usually results where it is clear, upon the record, that the evidence concerning the defendant's liability is conflicting and in doubt thus giving rise to an inference that a compromise resulted. A further analysis of just what is meant by a substantial though inadequate verdict will be included in the separate section discussing that subject.

There is, of course, sometimes room for legitimate difference of opinion over whether a given inadequate verdict is "substantial" or "nominal."[42] But such cases have arisen only infrequently and

[40] Bracken v. Champlin 114 Kan. 882, 220 P.1027 (1923), and Cosgrove v. Fogg, 152 Me. 464, 54 A.2d 538 (1947). See discussion in section V.

[41] Price v. McCormish, 22 Colo. App.2d 92, 70 P.2d 978 (1937) where the court held $200 to be substantial and stated that nominal damages could only be "a penny, 1 cent, 6¼ cents." See note 42 for related cases.

[42] See Batt v. Earle, 164 App. Div. 228, 149 N.Y.S. 623 (1914) and Corn Novelty Co. Inc. v. Norwich Union Fire Ins. Soc., Ltd., 176 App. Div. 261, N.Y.S. 1020 (1917) where the verdicts were for $100 each, but even here the courts had no difficulty interpreting the verdicts as nominal in each case.

afford no basis for thinking that the distinction between nominal and substantial verdicts is either unworkably uncertain or produces an unjustifiable amount of litigation. In doubtful cases, however, it would seem that the verdict should be regarded as "substantial" in order not to deprive plaintiff of the possibility of securing a new trial in accordance with the rules pertaining to substantial though inadequate verdicts.

B. Substantial Though Inadequate Verdicts

As in the discussion of the nominal verdicts the following analysis will be limited to state court decisions on the subject and to cases where the motion for new trial due to inadequate damages contemplates only a *complete* new trial. The question of inadequate verdicts within the federal judicial system will be discussed subsequently as will the problem of partial new trials confined to the question of damages alone.

1.

The first and perhaps the most basic distinction in the substantial though inadequate verdict case law hinges on whether plaintiff or defendant is moving for the complete new trial. Where defendant is the moving party, the vast majority of cases have held that relief must automatically be denied,[43] assuming of course that defendant would not otherwise be entitled to a new trial—on the ground, for example, that the verdict was manifestly contrary to the weight of the evidence on the question of liability. This almost universal refusal to grant relief rests on the obviously unrealistic assumption that the jury's verdict for plaintiff conclusively establishes defendant's liability and that the inadequacy of the verdict, therefore, prejudices only plaintiff and is harmless error to defendant.[44] As a matter of fact, of course, defendant typically has been prejudiced. He has been deprived of a clear-cut decision on the question of liability. As noted above,[45] the typical substantial though inadequate verdict involves an illicit

[43] Mills v. Rose, 166 Va. 572, 175 S.E. 230 (1934), Billow v. Billow, 360 Pa. 343 61 A.2d 817 (1948), and Fleming v. DeWitt, 41 Wash.2d 454, 249 P.2d 776 (1952).

[44] Mills v. Rose, 166 Va. 572, 595, 175 S.E. 230, 240 (1934) which stated: "The general rule is that in a personal injury case a verdict against a defendant will not be set aside on his motion on the ground that the damages awarded are less than the plaintiff was entitled to on the evidence. The rationale of the rule is that the defendant could not have been damaged by such a verdict."

[45] *Supra* page 700.

compounding of liability and damage questions and assuming that there is no other apparent explanation for the inadequacy—a simple mathematical error by the jury, for example—all substantial though inadequate verdicts should be presumed to represent illicit compromise verdicts.

This is not to say, however, that a defendant suffering a substantial though inadequate verdict against him should therefore automatically be granted relief. As will be discussed subsequently, this should ordinarily depend on the state of the evidence on the question of liability. However, there is absolutely no reason for the court's automatic refusal of relief to defendants. A defendant's right to a new trial for inadequacy of the verdict should be governed by the same rules as govern plaintiff's right to a new trial on this ground. Thus far, however, only a few jurisdictions have recognized this and even they appear to have done so with considerable hesitation.[46]

2.

Let us now turn to the more common situation where plaintiff rather than defendant requests a complete new trial for inadequacy of the verdict. In these cases the courts have usually aligned themselves with one of two basic theories. The first is that plaintiff is automatically entitled to a new trial as a *matter of right* simply upon showing that the verdict is substantial though inadequate. The second basic view makes plaintiff's right to relief depend on a judicial examination of the evidence relative to defendant's liability. The "no examination of the evidence" cases will be discussed first.

a. *Where No Examination of Evidence is Made*

If the jury's verdict in his behalf, though for substantial damages, is nonetheless inadequate or "clearly inadequate," a substantial minority of courts have held that plaintiff is entitled to a new trial as a matter of right.[47] The trial court, in other words, has little or no discretion to deny plaintiff's motion for a new trial. And this is true irrespective of what is likely to have caused the inadequacy, the only qualification being that plaintiff is not him-

[46] Bressler v. McVey, 82 Kan. 341, 108 P. 97 (1910), Schever v. Manashaw, 77 Misc. 208, 137 N.Y.S. 534 (1912).

[47] Foster v. Dukes, 301 Ky. 752, 193 S.W.2d 159 (1946); Sherer v. Smith, 85 Ohio App. 317, 88 N.E.2d 424 (1949); Hauk v. Zimmerman, 135 Conn. 259, 63 A.2d 146 (1948); Paustenbaugh v. Ward Baking Co., 374 Pa. 418, 97 A.2d 816 (1953).

self responsible, as for example, by requesting or acquiescing in erroneous instructions as to damages.[48] Thus, substantial though inadequate verdicts seemingly produced by juror prejudice against plaintiff or sympathy for defendant, by a mistake, or through a misapprehension of the issues stand on the same footing as those which can justifiably only be explained in terms of juror doubt over defendant's liability. For the purpose of determining whether plaintiff is entitled to a new trial, the jury's verdict is always regarded as conclusively settling the liability of the defendant and no examination of the evidence bearing upon this issue is made.

While a few courts have said that "passion and prejudice,"[49] rather than "mere inadequacy" is the basis for relief, this is true only in the strained technical sense that a substantial though inadequate verdict is conclusively presumed to have resulted from passion and prejudice[50] and that relief will always formally be rested upon this ground. In view of this presumption the *actual* cause of the jury's action is treated as immaterial and the end result is the same, i.e., plaintiff gets a new trial upon showing that the verdict is substantial though inadequate. This seems to be the case even where the courts use such tests as "grossly inadequate,"[51] "inadequate so as to shock one's conscience,"[52] "palpably inadequate,"[53] "manifestly too small,"[54] "incommensurate with substantial justice,"[55] and clearly inadequate."[56] From a careful reading of the cases it is apparent that, although each jurisdiction prefers to use its own terminology, the real test seems to be that

[48] Linitzky v. Gorman, 146 N.Y.S. 313 (1914).

[49] Cesario v. Demetria Realty Corp., 250 App. Div. 272, 294 N.Y.S. 26 (1937), and Coward v. Ruckert, 381 Pa. 388, 113 A.2d 287 (1955).

[50] State *ex rel.* State Highway Com. v. Liddle, 193 S.W.2d 625 (Mo. App. 1946).

[51] Dusckiewicz v. Carter, 115 Vt. 122, 52 A.2d 788 (1947).

[52] Glasser v. Leary, 67 So.2d 683 (Fla. 1953).

[53] McSee v. Chicago Motor Coach Co., 342 Ill. App. 238, 96 N.E.2d 381 (1950).

[54] Flournoy v. Brown, 200 Miss. 171, 26 So.2d 351 (1946) and Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951).

[55] Olson v. Thompson, 74 N.W.2d 432 (N.D. 1956).

[56] Nebraska persists in refusing to carefully examine the evidence on liability and a new trial will be granted where the evidence is *clearly inadequate.* Mares v. Chaloupka, 110 Neb. 199, 192 N.W. 397 (1923); Meier v. Bridgeport Irrig. Dist. 113 Neb. 344, 203 N.W. 543 (1925); Preston v. Farmers Irrig. Dist. 134 Neb. 503, 289 N.W. 336 (1938); Harper v. Young, 139 Neb. 624, 298 N.W. 342 (1941); Consumers Co-

a new trial should be granted where there is a showing that the verdict is substantial though inadequate. Even in jurisdictions employing the "passion and prejudice" test it is readily acknowledged that passion and prejudice may be inferred from an inadequate verdict alone.[57]

There is, of course, no justifiable basis upon which the propriety of granting plaintiff a new trial can ever be challenged in those cases where the verdict's inadequacy results from mistake, caprice, sympathy or prejudice.[58] Indeed, at least where no other form of relief is available, any other course would be intolerable. But these are the extraordinary situations. The typical case, as every trial judge and lawyer knows, is where the jury, or some one of them, entertained substantial doubts over defendant's liability and accordingly reduced plaintiff's damages either as a means of compensating, or atoning, for such doubts, or of resolving their basic differences over defendant's liability. There is, then, usually some question as to whether plaintiff was actually prejudiced by the verdict and whether his chances for a substantial increase are great enough to warrant the new trial. Recognizing this, a number of the jurisdictions make a detailed examination of the strength of plaintiff's showing as to defendant's liability. The right of a plaintiff, or defendant, to have a verdict for plaintiff set aside over the objection of the other party, does not, and should not, depend solely upon the evidence bearing upon the damage issue. The rules formulated by that class of cases which seek to make some examination of the evidence will now be discussed.

b. *Where the Evidence is Examined*

Both the apparent cause for the return of an inadequate verdict and the state of the evidence relative to the liability of the defendant have an important, and to a considerable extent interacting, bearing upon plaintiff's right to have a verdict set aside

op Ass'n v. Sherman, 147 Neb. 901, 25 N.W.2d 548 (1947); Ambrozi v. Fry, 158 Neb. 18, 62 N.W.2d 259 (1954); Schumacher v. Lang, 160 Neb. 43, 68 N.W.2d 892 (1955), and Dixon v. Coffey, 161 Neb. 487, 73 N.W.2d 660 (1955). This list represents all inadequate verdict cases decided in Nebraska and not once has there been a departure from the *clearly inadequate* test.

[57] State *ex rel.* State Highway Comm. v. Liddle, 193 S.W.2d 625 (Mo. App. 1946) and Quirk v. City and County of San Francisco, 105 Cal. App.2d 893, 232 P.2d 893 (1951).

[58] Blincoe v. Drury, 311 Ky. 613, 224 S.W.2d 936 (1949) and others too numerous to require mention.

for inadequacy.[59] As noted above,[60] state appellate courts have established fairly definite and exacting rules governing the situations in which motions for new trial based upon inadequacy of the verdict *must* be granted. Although these rules are by no means uniform throughout the states, state trial judges do have definite directives upon which to base their decisions. Generally speaking, these directives, in jurisdictions requiring a judicial examination of the liability evidence, are formulated in terms of four basic situations: (1) where the evidence preponderates so heavily for defendant that he was entitled to a directed verdict; (2) where the evidence "merely" preponderates for defendant though there is sufficient evidence to support a finding by the jury that defendant is liable; (3) where the evidence is "even" or "conflicting" and there is sufficient evidence to support a verdict in favor of either plaintiff or defendant; and (4) where the evidence clearly preponderates in favor of plaintiff though there is sufficient evidence to support a verdict finding defendant not liable. Each of these classes of cases will now be discussed separately.

1. *Where defendant should have been entitled to a directed verdict*

In these cases the evidence is insufficient to support plaintiff's verdict and a directed verdict for defendant should have been granted. And in such cases it is held with virtual unanimity that it is reversible error for the trial court to grant plaintiff's motion.[61] The reason for this, of course, is obvious. Plaintiff cannot be prejudiced by the smallness of the verdict in his favor for he is actually entitled to nothing. Where defendant acquieses in such a verdict plaintiff can hardly complain.

2. *Where the evidence merely preponderates for defendant*

The second class of cases arises where the evidence preponderates for defendant although there is sufficient evidence to support a finding by the jury that the defendant is liable. Here the preponderance, while in favor of defendant, is not such as to have entitled him to a directed verdict. Again, the vast majority of cases apply a harmless error theory and hold that a trial court

[59] Rawle v. McIlhenny, 163 Va. 735, 177 S.E. 214 (1934).

[60] *Supra* page 707.

[61] Maki v. St. Lukes Hosp. Ass'n, 122 Minn. 444, 142 N.W. 705 (1913); Adams v. Anderson & Middleton Lumber Co., 127 Wash. 678, 221 P. 993 (1924); Evans v. Yakima Valley Transp. Co., 39 Wash.2d 841, 239 P.2d 336 (1952).

order granting plaintiff's motion for new trial is a reversible abuse of discretion.[62] The plaintiff is said to have fared as well as possible because of the decided preponderance of the evidence in defendant's favor. There seems to be no doubt that this is also a proper result where defendant acquieses.

It should be noted that the refusal to allow a new trial to plaintiff where the liability evidence preponderates for defendant does not do violence to the principle that liability and damage issues are to be kept apart. The rationale of these decisions is simply that the inadequacy of the verdict was "harmless error" to the plaintiff, as he was not properly entitled to anything. Also, the chance that another jury might award plaintiff a verdict in line with the evidence on *damages* is outweighed by the expense involved and by the fact that substantial justice had been done.[63] The analogy is to the line of decisions where, though defendant is entitled to a directed verdict, the case is nonetheless improperly allowed to go to the jury which returns an inadequate verdict. In these cases, as already mentioned, plaintiff is universally denied relief.[64]

3. *Where the evidence is conflicting*

In this class of cases there is sufficient evidence to support a verdict in favor of either plaintiff or defendant although there is no clear preponderance of the evidence in favor of either party. It is at this point that the courts begin granting plaintiff's motion for new trial. Where the verdict is clearly for substantial though inadequate damages there seems to be no valid reason for refusing the motion.[65] Such a verdict cannot, upon any reasonable theory, be considered a holding for defendant as in the nominal verdict cases and the probability is that the jury has illicitly compromised. In this sort of case it should be *error to refuse* a new trial based upon inadequate damages.

In some jurisdictions, however, plaintiff's right to a new trial where the liability evidence is evenly balanced or, as the rule is

[62] Hubbard v. Mason City, 64 Iowa 245, 20 N.W. 172 (1884); Young v. Great Northern Ry. Co., 80 Minn. 123, 83 N.W. 32 (1900); McDowell v. City of Portsmouth, 184 Va. 548, 35 S.E.2d 821 (1945).

[63] Norland v. Peterson, 169 Wash. 380, 13 P.2d 483 (1932) and Isley v. McClandish, 299 Ill. App. 564, 20 N.E.2d 890 (1939).

[64] *Supra* note 61.

[65] Stone v. Turner, 178 Iowa 561, 159 N.W. 989 (1916); Lilly v. Eberhardt, 37 S.W.2d 599 (Mo. 1931); Bencich v. Market St. Ry. Co., 20 Cal. App. 2d 518, 67 P.2d 398 (1937).

sometimes stated, "conflicting or not free from doubt" is left entirely within the discretion of the trial court.[66] Under this view a trial court ruling either way will rarely ever be disturbed. A distinction is drawn between such cases and cases where liability is conceded or where the evidence relating-thereto preponderates in favor of plaintiff.[67] In these instances plaintiff's right to a new trial is almost absolute. The rationale for the distinction, while omitted in the cases, is unmistakable. In the last named instances, the probability is that the jury was actuated either by prejudice against plaintiff or sympathy for defendant. In the "conflicting or not free from doubt" cases, however, the inadequacy can usually only be explained in terms of juror doubt over defendant's liability, or, as the matter is ordinarily put, as a "compromise."

The next step in the reasoning of the courts following the above view is that "compromise verdicts," or at least those which have been sanctioned by the trial judge, should not lightly be set aside. This argument has several branches, one of which is that a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict and to sustain a verdict which is substantial. This simply begs the entire question. The second argument is that the granting of a new trial to plaintiff would just as likely constitute an act of injustice to defendant rather than one of justice to plaintiff and that in such event it can no more reasonably be said that the plaintiff recovered too little than that he should not have recovered at all. This also begs the question and is, again, merely another way of saying that compromise verdicts are all right and that plaintiff should be satisfied with what was given him, notwithstanding that neither liability or damage questions were properly adjudicated.

A final argument might be made to the effect that since juries very often compromise where the evidence concerning liability is conflicting and since they necessarily do so in most cases without detection, (because of the strict rules on impeachment of the verdict),[68] it makes little sense to set their compromises aside when the fact of compromise appears from the face of the verdict itself. But this is an obviously defective argument. In the first place,

[66] Paustenbaugh v. Ward Baking Co., 374 Pa. 418, 97 A.2d 816 (1953).

[67] Fitzgerald v. Penn. Transit Co., 353 Pa. 43, 44 A.2d 288 (1945) and Coward v. Rucker, 381 Pa. 388, 112 A.2d 287 (1955).

[68] Norton v. Hickingbottom, 212 Ark. 581, 206 S.W.2d 777 (1947); Kennedy v. Stocker, 116 Vt. 98, 70 A.2d 587 (1950); Clark v. Bradley, 106 Cal. App.2d 537, 235 P.2d 439 (1951); Schumacher v. Lang, 160 Neb. 43, 68 N.W.2d 892 (1955).

the substantial though inadequate compromise verdict will usually be far more prejudicial to plaintiff than a compromise verdict which cannot be detected and, second, juries do not always or perhaps even usually render compromise verdicts even in the area where they can do so without detection. Finally, refusal to set a compromise verdict aside in the only type of case where it is possible to do so makes a hallow mockery of the principle that liability and damages are to be kept apart and results in nonconformity in the administration of justice.

4. *Where the evidence preponderates for plaintiff*

Where liability is conceded[69] or where the evidence on such issue preponderates for plaintiff,[70] he is generally held entitled to a new trial as a matter of right just as in those jurisdictions which refuse to examine the state of the evidence as to liability and who regard the cause of the verdict's inadequacy as immaterial. The reason for this is apparent. Whatever the cause of the inadequacy, plaintiff has received less than the sum to which he is minimally entitled and relief cannot justifiably be refused on a theory of "harmless error." If liability is conceded plaintiff will unquestionably receive a larger recovery on retrial and this is also highly probable where the evidence on such issue preponderates in plaintiff's favor. An inadequate verdict, where a verdict for defendant is clearly improper, generally results from sympathy for defendant, prejudice against plaintiff, or from a mistake. Of course, where the eveidence as to liability is evenly balanced, the jurors have probably in most cases reduced damages as a means of compromising their differences over defendant's liability or to compensate for their doubts on this question. But here, unlike the situation where the evidence as to liability preponderates for defendant, plaintiff has a better than even chance of securing a proper verdict on re-trial. Relief cannot be denied without sanctioning the very practice giving rise to the verdict's inadequacy and depriving plaintiff of the right to have defendant's liability adjudicated without reference to the question of damages.

[69] Morton Lumber Co. v. Gaynor Lumber Co., 197 Iowa 308, 196 N.W. 1018 (1924), Taylor v. Rodriquez, 10 Cal. App.2d 608, 52 P.2d 494 (1936), Montgomery v. Simon, 309 Ill. App. 516, 33 N.E.2d 642 (1941), and Torrence v. Sharp, 246 Iowa 460, 68 N.W.2d 85 (1955).

[70] Whitney v. Milwaukee, 65 Wis. 409, 27 N.W. 39 (1886), Fleming v. Gemein, 168 Mich. 541, 134 N.W. 969 (1912), Cochran v. Mitchem, 27 Ga. 358, 84 S.E. 127 (1915), Howell v. Murdock, 156 Va. 669, 158 S.E. 886 (1931), and Swanson v. Sewall, 183 Wash. 462, 48 P.2d 939 (1935).

IV. FEDERAL LAW

An examination of the Federal Law has been saved until this point because of the marked disparity between it and the state court rules governing inadequate verdicts. As is obvious from what has been discussed, state appellate courts have, rightly or wrongly, formulated a definite set of rules to govern the handling of inadequate verdicts by state trial judges. Federal appellate courts, on the other hand, have to this day steadfastly refused to interfere with a decision of a federal district judge *granting* a new trial for inadequacy of the verdict. Traditionally, of course, federal district judges have been and still are vested with the discretionary power to grant new trials "in the interest of justice"[71] and it is difficult to imagine any inadequate verdict case, whether involving a nominal or substantial though inadequate verdict, where the ruling of the federal district judge granting a new trial would be reversed on appeal as an abuse of discretion. Certainly no case can be found in which such a holding was ever made. The problem, then, in so far as the federal system is concerned, is to review those situations in which federal appellate courts may lawfully reverse a federal district judge for *refusing* to grant a new trial for inadequacy of the verdict.

Historically, apart from certain exceptions later to be noted, federal appellate courts have refused to review the order of a federal district judge denying a new trial for inadequacy of the verdict.[72] Such refusal has been put on several grounds, among them the 7th Amendment,[73] a provision of the Federal Judiciary Act of 1789 precluding a review for "errors of fact,"[74] and upon the ground of stare decisis. The federal constitutional point, however, appears never to have been taken very seriously and the Judiciary Act point, for what it was ever worth, would seem forever to have been

[71] Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941), Daffinrud v. U. S., 145 F.2d 724 (7th Cir. 1944), Benjamin v. Lehigh Valley R. Co., 10 F.R.D. 154 (D.C.N.Y. 1950) and Charles v. Norfolk & W. Ry. Co., 188 F.2d 691 (7th Cir. 1951).

[72] Railroad Co. v. Fraloff, 100 U. S. 24 (1879) and Wilson v. Everts, 139 U. S. 616 (1890).

[73] Article 3, Section 2, of the original Constitution conferred upon the Supreme Court "appellate jurisdiction, both as to law and fact, with such exception and under such regulations as the Congress shall make." It was felt that this provision endangered the right of trial by jury as it existed at common law and the Seventh Amendment resulted. See Parson v. Bedford, 3 Pet. (28 U. S.) 433 (1830) and Metropolitan R. Co. v. Moore, 121 U. S. 558, 573 (1887).

[74] See § 22 of the Judicial Code of 1789, 1 Stat. 85 (1789).

laid to rest by a 1948 enactment allowing federal appellate courts to reverse, affirm or modify and enter any judgment whch should have been entered in the trial court.[75] As will be pointed out later, federal appellate courts have been free to reverse rulings of federal district judges denying new trials for the excessiveness of the verdict and no reason appears apart from stare decisis which would indicate that any different rule should be followed in the area of inadequate verdicts.

The problem then appears to be one of stare decisis and particularly of the meaning of the Supreme Court's inadequate verdict decision in *Fairmount Glass Works v. Cub Fork Coal Co.*,[76] decided in 1933. This was an action by the seller to recover damages for the buyer's refusal to accept certain coal deliveries and the evidence established that the highest market price of such coal *throughout* the delivery period was materially less than the contract price and that seller was entitled to a verdict in excess of $18,000 if entitled to anything. The jury returned a general verdict for seller but awarded only $1.00 as damages. The Court, by Justice Brandeis over a vigorous dissent by Justices Stone and Cardoza,[77] refused to upset the trial judge's ruling denying plaintiff's motion for a new trial. Because of its obvious importance to the development of the law of inadequate verdicts, the Court's opinion is considered here at some length.

The opinion, so far as it relates to the inadequate verdict feature of the case, divides into three parts. The first part is devoted to a consideration of seller's contention that review must be denied because of the ancient rule, originally considered to be without exception and employed as the sole justification for denying review in the Court's earlier inadequate verdict cases, that neither the Circuit Courts of Appeal nor the Supreme Court will "review the action of a federal trial court in granting or denying a motion for a new trial for *error of fact.*"[78] This contention was flatly rejected. Justice Brandeis relied on two grounds: *first,* the disappearance of the statutory basis and the invalidity of the constitutional grounds upon which the rule had been formerly rested; and, *second,* the existence of numerous cases outside the inadequate verdict

[75] See § 2106 of the Judicial Code of 1948, 62 Stat. 963 (1948), which omitted the words ". . . or for any error of fact."

[76] Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 (1933).

[77] *Id.* at page 486.

[78] *Id.* at page 481 where the Court cites Railroad Co. v. Fraloff, 100 U. S. 24, 31 (1879) and Lincoln v. Power, 151 U. S. 436, 438 (1894).

area in which review had in fact been granted and the trial court's ruling set aside. The rule had atrophied since the early days and its application was no longer to be taken for granted. Review would in future depend on the facts of the individual case. It became necessary to determine "whether the circumstances of the case at bar justify an enquiry [sic] into the trial court's refusal to set aside the verdict."[79]

The second branch of the opinion considers buyer's contention that the no review for error of fact rule should be held inapplicable by the time-honored method of turning a question of fact into an issue of law. Specifically, buyer argued that the verdict was "inconsistent on its fact" and that refusal to set it aside presented an issue of law. Apparently conceding the validity of buyer's argument in cases where the award "exceeded a statutory limit" (or presumably, was less than a statutory minimum), or "less than an amount undisputed," or "in clear contravention of the instructions of the trial court," it could not be accepted in a case such as *Fairmount* where the trial judge could reasonably have regarded the verdict as a "finding for the defendant," and there was no indication in the record that he did not.[80] This was because "appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appaising the jury's conduct."[81] The evidence as to liability was "conflicting" and the jury may have found for defendant but simply wished the costs to be taxed against the defendant. In other words, the Court would *presume* that a verdict for nominal damages where substantial damages or a verdict for defendant was technically required was, in effect, a verdict for defendant and had been so regarded by the trial court. It should be noted, however, that the Court failed to examine what the preponderance of the evidence showed as to liability, remarking only that the evidence as to liability was "conflicting."

A remaining point of significance lies in the Court's failure to specifically discuss why *Fairmount* was to be excluded from the class of cases where the jury's verdict was returned in "clear contravention" of the trial court's instructions and where review might be had for error of law in the event a new trial was denied,

[79] Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 483 (1933).

[80] *Id.* at pages 483 and 484. These exceptions will all be discussed in detail subsequently.

[81] 287 U. S. at 485.

a point heavily relied upon by the dissenting justices.[82] Apparently, the majority felt that a verdict for nominal damages which could be interpreted as a *de facto* verdict for defendant was not a "clear" violation, at least in the absence of a specific instruction by the trial court that a verdict for nominal damages was improper. The necessity for the qualification arises from the Court's apparent approval of *United Press Assn's v. Nat. Newspapers Ass'n*,[83] where such an instruction had been given and the trial court's ruling denying a new trial was reversed.

The final and weakest branch of the opinion disposes of buyer's contention that even if a question of fact rather than an issue of law be presented, the trial court's refusal to set aside the verdict constituted an "abuse of discretion" which buyer was entitled to have reviewed and corrected. Apparently granting that this would be true if an abuse was shown, "clearly the mere refusal to grant a new trial where nominal damages were awarded . . . (was) not an abuse."[84] Presumably, this was thought to be *clear* because of what was said in the second branch of the opinion and also because the Court "frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate and the circuit courts of appeals (had) generally followed a similar policy."[85] At this point the Court expressly reserved for the future the question of "whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion."[86]

The reservation just noted, coupled with the Court's insistence that the withered "no review for error of fact" rule can no longer be invoked as a self-sufficient basis for declining review in cases where the verdict is attacked as inadequate, but that the circumstances of each case must now be examined, has left the federal law of inadequate verdicts, so far as review is concerned, in a state of uncertainty. For *Fairmount* itself, apart from deciding that review must be declined where the trial judge could be regarded as having interpreted a verdict for *nominal* damages as a *de facto* finding for defendant, offers almost no indication of the circum-

[82] *Id.* at page 486.

[83] United Press Assn's. v. Nat. Newspapers Ass'n., 254 Fed. 284 (8th Cir. 1918).

[84] 287 U. S. at 485.

[85] *Ibid.*

[86] *Ibid.*

stances under which review will be granted or denied, and the Court has not had occasion to pass upon the subject since.

The most troublesome ambiguity of *Fairmount* lies in the Court's failure to distinguish between inadequate verdict cases of the type there considered, where the verdict was merely for *nominal* damages, and the much more numerous cases where the verdict, although for *substantial* damages, is nonetheless inadequate, as in *Railroad Co. v. Fraloff*[87] and *Wilson v. Everts*,[88] the Court's only other inadequate verdict cases, decided in 1879 and 1890 respectively. *Fraloff* was an action to recover the value of certain property lost in transit. The jury's verdict of $10,000 fell short of the property's value as shown by the evidence by approximately $65,000. *Wilson* was an action for breach of an employment contract, the jury's verdict of $10,000 being $5,000 less (or $5,000 more) than the sum to which plaintiff was entitled according to the evidence, if he was entitled to anything at all. Review of the trial court's ruling denying a new trial for inadequacy of the verdict was declined in both cases without discussion, the Court referring only to the "no review for error of fact" rule, since repudiated as a general principle in *Fairmount*. Because of such repudiation and in view of the heavy reliance in *Fairmount* upon the circumstance that the trial judge could there have interpreted the verdict as a *de facto* finding for defendant, the question of whether *Fraloff* and *Wilson* are any longer controlling may now fairly be regarded as open. The substantial though inadequate verdicts which the Court refused to review, of course, cannot by any stretch of the imagination be interpreted as findings for the defendant and, unlike the nominal verdict in *Fairmount*, almost certainly represent illicit compromises between liability and damages.

Be this as it may, the Circuit Courts of Appeal have generally taken the view that *Fraloff* and *Wilson* are still viable and that *Fairmount* is normally to be interpreted as requiring a denial of review in cases involving "substantial though inadequate" verdicts as well as in cases where the verdicts are merely nominal. *Caloric Stove Corp. v. Chemical Bank & Trust Co.*,[89] for example, was an action for money had and received and the evidence showed that the jury's award of $28,500 fell short of plaintiff's losses by at least $3,750 and probably much more. On appeal from the trial court's

[87] Railroad Co. v. Fraloff, 100 U. S. 24 (1879).

[88] Wilson v. Everts, 139 U. S. 616 (1890).

[89] Caloric Stove Corp. v. Chemical Bank & Trust Co., 205 F.2d 493 (2nd Cir. 1953).

denial of plaintiff's motion for a new trial, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, refused to disturb the judgment, reasoning that "it was less irrational to award somewhat lower damages than the lowest the evidence justified, (as in *Caloric*), than it was to award only nominal damages when substantial damages were the necessary consequence of a verdict for the plaintiff,"[90] as in *Fairmount.* Since the Supreme Court had declined review in *Fairmount,* the substantial though inadequate verdict in *Caloric* was *a fortiori.* Judge Hand also referred to his earlier opinion in *Miller v. Maryland Casualty Co.,*[91] which, like *Caloric,* also involved a substantial though inadequate verdict, the reference being significant because of *Miller's* reliance upon *Fraloff* and *Wilson* as requiring a refusal to review. The notion that the Supreme Court's refusal to review in *Fairmount* likewise normally precludes review in substantial though inadequate verdict cases like *Caloric* also finds support in the holdings of the Tenth Circuit[92] and of the Court of Appeals for the District of Columbia.[93]

A contrary view, however, was taken by the Sixth Circuit Court of Appeals in *Reisberg v. Waters,*[94] a personal injury action. The jury's verdict of $1,500 was roughly $750 less than plaintiff's pecuniary losses and, furthermore, plaintiff had sustained *serious* personal injuries. After making pointed mention of the fact that the jury's verdict was for "substantial" rather than "nominal" damages, thus avoiding the *ratio decidendi* of *Fairmount,* the trial court's ruling denying plaintiff's motion for a new trial was reversed on the ground "that a verdict in contravention of the instructions of the court may be reversed on appeal as contrary to law,"[95] which *Fairmount,* as we have seen, expressly, but without explanation, concedes. The Court also drew support from certain language in the Supreme Court's opinion in *Dimick v. Schiedt,*[96] which succeeds *Fairmount* by two years, that a "verdict returned by a jury which is palpably and grossly inadequate

[90] *Id.* at 497.

[91] Miller v. Maryland Casualty Co., 40 F.2d 463 (2nd Cir. 1930), which contains an excellent discussion of the problems inherent in this area.

[92] Green Construction Co. v. Chicago, R.I. & Pac. Ry. Co., 65 F.2d 852 (10th Cir. 1933).

[93] Dean v. Century Motors, 154 F.2d 201 (D.C. Cir. 1946).

[94] Reisburg v. Walters, 111 F.2d 595 (6th Cir. 1940).

[95] *Id.* at page 598.

[96] Dimick v. Schiedt, 293 U. S. 474 (1935).

. . . should not be permitted to stand,"[97] and from the interpretation placed on such opinion by the dissenting opinion of Justice Stone, which was concurred in by Chief Justice Hughes and Justices Brandeis and Cardoza, that:

> If the effect of what is now decided is to liberalize the traditional common-law practice so that the denial of a motion for a new trial, made on the ground that the verdict is excessive or inadequate, is subject to some sort of appellate review, the change need not be regarded as unwelcome, even though no statute has authorized it.[98]

The *Reisberg* opinion, however, leaves much to be desired. No reference is made either to *Fraloff* or *Wilson* and the Court appears only obliquely to recognize the existence of any distinction between a verdict for nominal damages and a verdict for substantial damages which is nonetheless inadequate. Aside from observing that the verdict was for "substantial" damages and that it demonstrated "an improper compromise between liability and compensation,"[99] the opinion is completely silent on this question.

While *Reisberg* appears to be the only square holding that *Fairmount* normally operates to permit appellate court reversal in cases involving substantial though inadequate (as distinguished from merely nominal) verdicts, inferential support for this view is found in several cases where appellate courts have reversed trial court rulings denying *defendant's* motion for a new trial on the ground that the verdict is *excessive*. This, of course, is because the "no review for error of fact" rule, repudiated as a general principle in *Fairmount* had theretofore always been understood as requiring a denial of review in excessive as well as in inadequate verdict cases.

What appeared to be the first major breakthrough, dealing with review of either an excessive or inadequate verdict came in 1925 with the decision in *Cobb v. Lepisto*[100] which was a Ninth Circuit opinion holding that the refusal to set aside a verdict which is grossly excessive constituted an abuse of discretion reviewable on appeal. Although this was followed with several other decisions allowing review in excessive verdict cases, the two leading cases are *Southern Pac. Co. v. Guthrie*,[101] and *Virginian*

[97] *Id.* at page 486.

[98] 293 U. S. at page 489.

[99] 111 F.2d at page 598.

[100] Cobb v. Lepisto, 6 F.2d 128 (9th Cir. 1925).

[101] Southern Pac. Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1951).

Ry. Co. v. Armentrout.[102] The *Guthrie* case was decided by the Ninth Circuit Court of Appeals and the Court makes an exhaustive consideration of *Fairmount's* effect upon its earlier holding in *Cobb v. Lepisto.* After noting that *Fairmount* appeared to rest on the ground that the nominal verdict there involved might be explained as a finding for defendant, the Court proceeded to interpret *Fairmount* as conceding that the "no review for error of fact" rule could no longer be relied upon as a self-sufficient basis for denying review where the verdict is attacked *either as excessive or inadequate. Cobb v. Lepisto* was accordingly allowed to stand, as supported by the "present trend of authoritative decision."[103] In so stating, the Court further relied upon the decline and fall of the "no review for error of fact" rule in criminal cases and upon Rule 75 of the *Federal Rules of Civil Procedure,* relating to the record on appeal, which is even broader in scope than the bill of exceptions to which the Supreme Court pointed in *Fairmount* as justifying its statement that a statutory basis for the "no review for error of fact" rule no longer exists.[104] *Fairmount* has been similarly interpreted in excessive verdict cases arising in the Court of Appeals for nearly every Circuit. The case of *Virginian Ry. Co. v. Armentrout,* reflects the general consensus of opinion with the following statement:

> We do not understand the rule (as stated in *Fairmount*) to have application, however, in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of the evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as is the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.[105]

But whether these interpretations of *Fairmont,* as applied to cases involving substantial though inadequate verdicts, is correct or whether *Fairmount* normally requires a denial of review in such cases, it has nowhere been asserted that review must *under all circumstances* be declined. Indeed, *Fairmount* itself recognizes certain instances in which review should be granted, one of which, "where the award is . . . in clear contravention

[102] Virginian Ry. Co. v. Armentrout, 166 F.2d 400 (4th Cir. 1948).

[103] 186 F.2d at page 929.

[104] *Id.* at page 930.

[105] 166 F.2d at page 408.

of the instructions of the trial court,"[106] is, as we have seen, clearly broad enough to permit review in all cases where the verdict is attacked as inadequate save only in the particular nominal verdict situation presented in *Fairmount, i.e.,* where the verdict can justifiably be explained as a finding for defendant and no specific instruction as to the impropriety of a nominal verdict is involved. However, as the most probable meanings of the Court's phrase have already been considered, nothing would be gained by further discussion here.

Review was also sanctioned in cases where the verdict is less than a statutory minimum or "an amount undisputed."[107] No federal cases involving the first type of veredict have yet arisen, but the second is presumably illustrated by *Glenwood Irr. Co. v. Vallery,*[108] cited by way of illustration and apparently approved in *Fairmount. Glenwood* was a negligence action to recover the value of a trestle destroyed by fire and the jury's verdict was approximately $1,200 less than the uncontraverted amount the court instructed was due if plaintiff was entitled to recover. Reasoning that either an "error of law" or an "abuse of discretion" as to a matter of fact was presented, the trial court's ruling denying plaintiff's motion for new trial was reversed. The circumstance that the trial court had expressly instructed the jury as to the amount due was not stressed and was obviously regarded as unimportant by the Supreme Court in *Fairmount.* For the Court not only fails to refer to the instruction but also expressly sanctions review in cases where the verdict is in "clear contravention" of the instructions of the trial court. This phrase, it seems clear, would cover *Glenwood* under the most narrow construction and there would then have been no reason for generally sanctioning review in cases where the verdict is for "less than an amount undisputed." However, the circumstance that *Fairmount* requires a denial of review in nominal verdict cases where no instruction as to the impropriety of such a verdict has been given, while appearing to sanction review if such an instruction is involved, leaves the question in some doubt.

Finally, it will be recalled that *Fairmount* allows reviews in cases where the inadequacy of the verdict is attributable to "erroneous instructions on the measure of damages."[109] This situa-

[106] 287 U. S. at page 484.

[107] *Id.* at page 483.

[108] Glenwood Irr. Co. v. Vallery, 248 Fed. 483 (8th Cir. 1918).

[109] 287 U. S. at page 484, citing Chesapeake & O. Ry. Co. v. Gainey, 241 U. S. 494 (1916).

tion, of course, is not really an exception to the "no review for error of fact rule," for review of erroneous instructions as to damages has traditionally been available to the injured party by a writ of error,[110] a "question of law" rather than a "question of fact" being involved. If this technical nicety be ignored, however, a granting of review in such cases would seem to justify it on authority in any case where the verdict's inadequacy is or may be the product of trial court error and not merely the result of illogicality on the part of the jury. Unfortunately, however, the only two cases found to any extent illustrating this principle, *Pugh v. Bluff City Excersion Co.*,[111] to which the Supreme Court neutrally referred in *Fairmount*, and *Legler v. Kennington-Saenger Theatres, Inc.*,[112] a recent decision of the Fifth Circuit Court of Appeals, come dangerously near violating, if they do not in fact violate, the rule of decision in *Fairmount*. *Pugh* was a wrongful death action where the jury's verdict of $1.00 might conceivably have been avoided had the trial court, (instead of giving an instruction couched in generalities), expressly instructed that a nominal verdict was improper when the jury returned to the court room and specifically inquired as to the propriety of such a verdict. *Legler* was a personal injury action in which the jury's verdict of $274 (only a small fraction of the actual monetary loss shown, exclusive of pain and suffering), could possibly have resulted from error on the part of the court in submitting to the jury the issue of contributory negligence.

Although not referred to in *Fairmount*, another instance where review may clearly be had is where the verdict's inadequacy results from the misconduct of counsel. This exception, if it is to be so regarded, is impliedly sanctioned by *Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin*,[113] an FELA action in which an excessive verdict was found by the trial court to have resulted from improper argument of plaintiff's counsel. The trial court attempted to cure the excessiveness by requiring plaintiff to re-

[110] James v. Evans, 149 Fed. 136 (3rd Cir. 1906), Jones v. Smith, 158 Fed. 911 (C.C.A. Penn. 1908) and Eteepain Co-op Society v. Lillback, 18 F.2d 912 (1st Cir. 1927).

[111] Pugh v. Bluff City Excersion Co., 177 Fed. 399 (6th Cir. 1910) where it was held that the trial court's instruction should have gone further in preventing the jury from returning a nominal verdict.

[112] Legler v. Kennington-Saenger Treatres, Inc., 172 F.2d 982 (5th Cir. 1949).

[113] Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin, 283 U. S. 520 (1931).

mit a portion of the verdict, plaintiff assenting in order to avoid a new trial. On defendant's appeal from the trial court's refusal to grant its motion for a new trial, the Supreme Court held that a verdict "which is found to be in any degree the result of appeals to passion and preejudice" could not stand,[114] that the defect could not be cured by remittitur and a new trial should have been granted. Although involving an excessive verdict, *Moquin* seems equally applicable to inadequate verdict cases.

Oddly enough, however, the only case actually involving an inadequate verdict attributable to the misconduct was decided without reference to *Moquin.* The case in question, *Indamer Corp. v. Crandon,*[115] was a negligence action to recover the value of an airplane destroyed by fire and the jury's inadequate verdict of $10,000, (at least $27,000 less than the plane's value as shown by the evidence), clearly resulted from defense counsel's improper statement that plaintiff had been fully indemnified by his insurance company, the casual link being evidenced by the fact that the jury returned after forty minutes' deliberation and asked whether it had been established that insurance was paid. On appeal from the trial court's ruling denying plaintiff's motion for a new trial, the Court of Appeals for the Fifth Circuit held that a new trial should have been granted but confined solely to the question of damages. The exact basis of the Court's ruling is unclear, but the overall thrust of the opinion seems to be that *Fairmount* (fortified by certain language in *United States v. Johnson*[116] and *Lavender v. Kurn*[117] repudiated the "no review for error of fact" rule in cases "(w)here. . . the amount of damages found by the jury bears no relation to the proof submitted"[118] and where the verdict's inadequacy results from the misconduct of an attorney. But *Moquin* was not mentioned and the Court relies as heavily upon its interpretation of *Fairmount* as repudiating the "no review for error of fact" rule in its absolute form as upon the prejudicial statement of defense counsel. This is especially significant because the case could easily have been rested on the ground that a "procedural error of law" rather than an "error of fact" was involved and that the "no review for error of fact" rule, even in its pre-*Fairmount* form, was inapplicable.

[114] *Id.* at page 521.

[115] Indamer Corp. v. Crandon, 217 F.2d 391 (5th Cir. 1954).

[116] United States v. Johnson, 327 U.S. 106 (1946).

[117] Lavender v. Kurn, 327 U.S. 645 (1946).

[118] 217 F.2d at page 393.

In concluding this section it must be said that as a practical matter a verdict of $1.00, as in *Fairmount,* can *only* be regarded as a finding for defendant with an effort to free plaintiff of the costs of suit. The $1.00 verdict cannot represent a compromise in that nothing is to be gained by giving plaintiff only $1.00 if the jury actually felt defendant to be liable. It is highly improbable that any juror or jurors who felt plaintiff entitled to damages would agree to a compromise giving him only one dollar. In direct contrast to this situation it is clear that in most cases where the verdict is for substantial though inadequate damages, as in *Caloric,* the result can do nothing but represent a compromise between liability and compensation. Such a verdict should not be allowed to stand and where it is permitted, and no distinction is drawn between nominal and substantial verdicts, compromise verdicts are sanctioned to that extent. In these cases both parties must be given the right to a conclusive determination of the question of liability. The liability and damage aspects of the case should be kept separate as much as possible and giving countenance to the compromise verdict in the form of a substantial though inadequate verdict is not the proper method of accomplishing this result.

V. NEW TRIAL ON DAMAGES ONLY

The discussion has heretofore assumed that the only possibility of relief from an inadequate verdict is a complete new trial. There are, however, two alternative possibilities: (1) a new trial confined solely to the question of damages and (2) a judicial increase in the verdict commonly known as an additur. Problems connected with the partial new trial on damages alone will be discussed first and the discussion will encompass both state and federal law.

A. The State Courts

The question of whether, and under what circumstances, plaintiff may retain the advantages of the jury's finding in his behalf regarding liability and confine the new trial solely to the question of damages entails problems quite different than those where a complete new trial is sought. At common law the jury verdict was viewed as "wholly indivisable" and such a practice was not allowed under any circumstances.[119] This rule has long since been abandoned in England and is today followed in only a very

[119] Watt v. Watt, A.C. 115 (1905).

few states.[120] In the majority of states, either by statute, rule of court or judicial decision it is held that a new trial may, under certain circumstances, be restricted solely to the question of damages.[121] However, the trial court's refusal to do so is seldom, if ever, held a reversible abuse of discretion.

It must be noted at the outset that there are a few specific situations where a new trial will almost automatically be allowed on the question of damages alone, such as where the damages are inadequate or excessive merely because of mistake[122] or where there was a ministerial error.[123] Also, there will generally be no distinctions drawn between excessive and inadequate verdicts in this area.[124]

The judicial approach to this question has been substantially uniform. Plaintiff is entitled to such a separation only where he is able to make a "clear showing" that the inadequacy of which he complains resulted from a cause other than jury doubt as to defendant's liability. If such a showing is made it is generally recognized in negligence cases that a court has the power to set aside an inadequate verdict and to limit a new trial to the issue of damages alone.[125] This view also prevails where inadequate damages have been awarded for false representations,[126] malicious

120 New York expressly announced, in Reilly v. Shapmar Realty Corp., 267 App. Div. 198, 45 N.Y.S.2d 356 (1943), that it would not allow a new trial on damages alone where the amount of damages is unliquidated. Meyers v. Mohr, 1 Misc.2d 776, 148 N.Y.S.2d 487 (1955). See also: Edelstein v. Kidwell, 139 Ohio St. 595, 41 N.E.2d 564 (1942) which held that the trial court could not grant a new trial for inadequacy without vacating the entire verdict of the jury and having a trial *de novo.*

121 Martin v. Donohue, 30 Cal. App.2d 219, 85 P.2d 913 (1938); Kovacovich v. Phelps, 62 Ariz. 193, 156 P.2d 240 (1945); Blacktin v. McCarthy, 31 Minn. 313, 42 N.W.2d 818 (1950), Lilly v. Boswell, 362 Mo. 444, 242 S.W.2d 73 (1951); Whiteside v. Harvey, 124 Colo. 561, 239 P.2d 989 (1952); Courtney v. Apple, 345 Mich. 223, 76 N.W.2d 80 (1956); and Kappovich v. LeWinter, 43 N.J. Super. 528, 129 A.2d 299 (1957).

122 Rafferty v. Public Service Interstate Transp. Co., 13 N.J. Misc. 80, 177 A. 357 (1934).

123 Petrosino v. Public Service Coordinated Transport, 1 N.J. Super. 19, 61 A.2d 746 (1948).

124 Simmons v. Fish, 210 Mass. 563, 97 N.E. 102 (1912), and Belcaro Realty Inv. Co. v. Norton, 103 Colo. 485, 87 P.2d 1114 (1939).

125 Reay v. Beasley, 49 Ariz. 362, 66 P.2d 1043 (1937), Borgstede v. G. H. Wetterau & Son Grocery Co., 116 S.W.2d 179 (Mo. App. 1938), Daanen v. MacDonald, 254 Wis. 440, 37 N.W.2d 39 (1949), and Woods v. Eitze, 94 Cal. App.2d 910, 212 P.2d 12 (1949).

126 Busse v. White, 287 S.W. 600 (Mo. App. 1926).

prosecution,[127] *trespass quare clausum*[128] and others.[129] The power rests largely within the discretion of the trial court, depending upon the facts of each particular case, and appellate review of the trial court's ruling will only be granted upon a showing that there was an abuse of discretion.[130]

The states have applied a variety of tests to determine whether the new trial can be limited solely to the question of damages. It has been held that a new trial will be granted on damages alone where the only issue remaining undecided is that of damages,[131] where it is certain that the error complained of did not affect the other issues,[132] and where passion and prejudice did not affect the question of liability.[133] A careful reading of the decisions, however, reveals that the factor deemed most relevant in establishing such a showing concerns the relative strength or weakness of plaintiff's showing as to defendant's liability. With few exceptions the courts have held that a new trial confined solely to damages is improper if the liability is contested and the evidence is "conflicting and not free from doubt"[134] or, *a fortiori*, if it weighs more heavily in favor of the defendant.[135] In these situations the plaintiff must accept a complete new trial (if he can get it) or nothing. To sustain a motion for the separa-

127 Padayao v. Severence, 116 N.J.L. 285, 184 Atl. 514 (1936).

128 Cosgrove v. Fogg, 152 Me. 464, 54 A.2d 538 (1947).

129 See Flournoy v. Brown, 200 Miss. 171, 26 So.2d 351 (1946) where the rule was held applicable to actions for breach of contract.

130 Southern Pac. Co. v. Gastelum, 36 Ariz. 106, 283 P. 719 (1929); Keogh v. Maulding, 52 Cal. App.2d 17, 125 P.2d 858 (1942); Wax v. Althuler, 22 N.J. Super. 229, 91 A.2d 768 (1952); and Murphy v. Wilson, 141 Cal. App.2d 538, 297 P.2d 22 (1956).

131 Paul v. Western Distributing Co., 142 Kan. 816, 52 P.2d 379 (1935).

132 Monroe v. Sterling, 92 N.H. 488, 32 A.2d 820 (1943); and Esposito v. Lazar, 2 N.J. 257, 66 A.2d 172 (1949).

133 Lundblad v. Erickson, 180 Minn. 185, 230 N.W. 473 (1930) and Rafferty v. Public Service Interstate Transp. Co., 13 N.J. Misc. 80, 177 A. 357 (1934).

134 L. C. James Motore Co. v. Whitmore, 36 Ariz. 382, 286 P. 180 (1930); Tovrea Equipment Co. v. Gobby, 72 Ariz. 38, 230 P.2d 512 (1951); Wilson v. Rhoades, 133 Cal. App.2d 367, 247 P.2d 727 (1952); and Meyers v. Smith, 51 Wash.2d 700, 321 P.2d 551 (1958).

135 Kistler v. Wagoner, 315 Mich. 162, 23 N.W.2d 387 (1946), where the defense against liability was so substantial as to preclude the partial new trial. However, as mentioned in Section II (*supra* page) the new trial will rarely be granted where the evidence as to liability preponderates in favor of defendant.

tion the clear preponderance on liability must rest with plaintiff or defendant must have conceded liability.[136] Proof of liability must be exceptionally clear[137] and if the legal and factual issues are intertwined and the liability and damage questions closely interwoven a new trial on the single issue of damages is rarely feasible.[138] A new trial should not be narrowed to the quantum of damages unless it is plain that the error committed at the trial was so limited in character as to be separable, with justice to both parties, from the other issues determined by the first verdict.

There is one important though small class of cases where an examination of the evidence as to liability is ordinarily regarded as unnecessary to uphold the granting of a restricted new trial. These are cases where the inadequacy of the verdict is traceable *with certainty* to a cause other than juror doubt over defendant's liability. Examples of such instances are: where the parties agree to a limited new trial,[139] where the jury illegally apportioned damages between two defendants[140] and where liability is expressly conceded.[141] Also included in this class are many of those cases where the damages are clearly *liquidated* and capable of easy calculation. In such cases there is ordinarily no reason to doubt that the jury was not definite in its findings as to the defendant's liability and hence no reason exists to deny the plaintiff that part of the verdict pertaining to liability. However, apart from this limited group of cases plaintiff's right to a restricted new trial in the vast majority of jurisdictions will depend chiefly on the state of the evidence as to liability. Unless such evidence preponderates in his favor, or he can "clearly show" that the issues of negligence and damage are not inseparably blended, this extraordinary form of relief will be denied.[142]

[136] Ready v. Hafeman, 239 Wis. 1, 300 N.W. 480 (1941); Marvin v. Byrd, 67 So.2d 416 (Fla. 1953), and Kovacovich v. Phelps Dodge Corp., 62 Ariz. 193, 156 P.2d 240 (1945) and liability was admitted.

[137] Lundblad v. Erickson, 180 Minn. 185, 230 N.W. 473 (1930), and Degenring v. Kinble, 115 N.J. L 379, 180 Atl. 685 (1935).

[138] Munsey v. Safeway Stores, 65 A.2d 598 (D.C. Mun. App. 1949) and Toshio Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910 (1952).

[139] Newbury Bank v. Eastman, 44 N.H. 431 (1862).

[140] Walder v. Manahan, 21 N.J. Misc. 1, 29 A.2d 395 (1942) and Paolercio v. Wright, 2 N.J. 412, 67 A.2d 168 (1949).

[141] Kovacovich v. Phelps Dodge Corp., 62 Ariz. 193, 156 P.2d 240 (1945) and Marvin v. Byrd, 67 So. 2d 416 (Fla. 1952).

[142] It is uniformally recognized that a new trial should never be ordered on the question of damages alone if there is any suspicion or inference

One final remaining question concerns the use of the new trial on damages alone in comparative negligence jurisdictions. Where comparative negligence prevails the issues of liability and damages would seem to be so closely intertwined as to preclude the partial new trial. Further, a new trial on damages alone would not be feasible where the jury *must* know the extent of each party's liability *in order to assess the damages.* The case law is otherwise. Courts in comparative negligence jurisdictions have uniformally allowed the partial new trial without distinguishing between the comparative and non-comparative situations.[143] However, the Mississippi case of *Vaughan v. Bollis*[144] touches slightly at the heart of the problem. Here plaintiff appealed on the grounds of inadequacy and the Supreme Court of Mississippi granted a new trial on the question of damages alone. Although awarding the partial new trial the court makes the following statement:

> We hold that upon a re-trial of this case, *all of the facts* should be presented to the jury on the question of negligence of all parties, including appellant, and the jury will have the right to apportion damages under the comparative negligence statute. (Emphasis added)[145]

of a compromise between liability and compensation. See Reay v. Beasley, 49 Ariz. 362, 66 P.2d 1043 (1937); Greenberg v. Holfeltz, 244 Minn. 175, 69 N.W.2d 369 (1955); Woods v. Eitze, 94 Cal. App.2d 910, 212 P.2d 12 (1950) and Johnson v. Sgourakis, 20 N.J. Super. 77, 89 A.2d 273 (1952). In these cases if a new trial is not granted on *all* issues it is held to be an abuse of the trial court's discretion. McNear v. Pacific Greyhound Lines, 63 Cal. App.2d 11, 146 P.2d 34 (1944). In this connection, many courts have even gone so far as to hold than an inference that the verdict is the result of a compromise may be drawn from the inadequacy of the damage alone. See Sussman v. Yellow Taxi Cab Co., 7 N.J. Misc. 325, 145 Atl. 470 (1929), W. T. Grant Co. v. Tanner, 170 Tenn. 451, 95 S.W.2d 926 (1936) and Hendrickson v. Koppers Co., 11 N.J. 600, 95 A.2d 710 (1953). It has been held that such an inference may be drawn from the fact that there was a distinct conflict of evidence on the question of liability. Farr v. Fisher, 107 Vt. 331, 178 Atl. 883 (1935) and Wright v. Estep, 194 Va. 332, 73 S.E.2d 371 (1952).

143 Nebraska: Harper v. Young, 139 Neb. 624, 298 N.W. 342 (1941) which specifically granted a new trial on the issue of damages alone. However, see Harman v. Swanson, 169 Neb. 452, 100 N.W.2d 33 (1959) which held that Nebraska would not recognize a *motion* for a new trial on the issue of damages only. Mississippi: Yazoo & M.V.R. Co. v. Scott, 108 Miss. 871, 67 So. 491 (1915) and Vaughan v. Bollis, 221 Miss. 589, 73 So.2d 160 (1954). Wisconsin: Ready v. Hafeman, 239 Wis. 1, 300 N.W. 480 (1941) and Anderson v. Tri-State Home Imp. Co., 268 Wis. 455, 67 N.W.2d 853 (1955).

144 Vaughan v. Bollis, 221 Miss. 589, 73 So.2d 160 (1954).

145 *Id.* at page 163.

Just what type of evidence is to be presented to the jury in this new trial on damages only is not speficied but it is apparent that upon re-trial the jury will be expected to make some determination as to liability. In other words, the new trial will not *actually* be limited to the question of damages alone. The propriety of this type of a holding will not be discussed but for purposes of this analysis it is clear that Mississippi, while ordering a new trial on the issue of damages alone, does not intend that all evidence as to liability be excluded. In the remainder of comparative negligence jurisdictions, where partial new trials have been granted, the complications are not discussed and it is apparently assumed that the issue of liability has been settled. This seems to be a questionable result. In the average comparative negligence situation, assuming that there is *some* evidence as to plaintiff's contributory negligence, there is never a conclusive determination of liability and a new trial should not be granted on the issue of damages alone.

B. The Federal Courts

At an early date the United States Supreme Court announced that the practice of granting a new partial trial was not to be commended.[146] However, in the 1915 opinion in *Norfolk Southern Railroad Company v. Ferebee,*[147] such a practice was recognized with the following note of caution:

> Before granting partial new trials, in any case under the Federal Employers' Liability Act, it should, as said by the Supreme Court of North Carolina, 'clearly appear that the matter involved is entirely distinct and separable from other matters involved in the issue . . . and that no possible injustice can be done to either party.' In cases of this character we do not know that the practice is generally to be commended.[148]

The requirements to be met before such a remedy will be granted are much the same as those discussed earlier in analyzing the approach taken by the state courts. It has been held by the Supreme Court that:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be re-tried is so distinct and separable from the others that a trial of it alone may be had without injustice.[149]

[146] American R. R. Co. v. Didrickson, 227 U.S. 145 (1913) and Grand Trunk Ry. v. Lindsay, 233 U.S. 42 (1914).

[147] Southern Railroad Company v. Ferebee, 238 U.S. 269 (1915).

[148] 238 U.S. at 274, citing Jarrett v. Trunk, 144 N.C. 299, 56 S.E. 937 (1907).

[149] Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 500 (1931), citing Norfolk Southern R. Co. v. Ferebee, *supra* note 147.

Since the adoption of the Federal Rules of Civil Procedure in 1939 the question of partial new trials has been governed by Rule 59(a) which states that: "A new trial may be granted to all or any of the parties and on all or part of the issues."[150] This has been interpreted to mean that a reviewing court may, when remanding the cause for a new trial, limit the new trial to issues affected by the error whenever these issues are entirely distinct from matters involved in other issues and trial can be had without danger of complication with other matters.[151] This definition includes the issue of damages and it is uniformally held that, under Rule 59, a new trial will be granted on the issue of damages alone where there is no inference of a compromise or unsatisfactory proof of liability,[152] where the verdict failed to include all elements of damages as instructed by the court,[153] or where the verdict rendered was uncertain as to the amount of damages.[154] Thus, the requirements for the granting of a new trial on the issue of damages alone are much the same as those in the state courts. A partial new trial will not be granted unless the issues are entirely separate and distinct and only where there is no inference of a compromise or sympathy verdict.

VI. THE ADDITUR

Seldom has a procedural device been more overrated, more misunderstood, and more productive of serious injustice than the practice of increasing the verdict by a court order, known as additur, in lieu of and to save the expense of a new trial for inadequacy of the verdict. Actually of extremely limited usefulness, the additur has nonetheless received the enthusiastic approval of the commentators as a general cure-all for inadequate verdicts. The term additur is used herein to describe an order by which a plaintiff's motion for a new trial on the ground of inadequate damage is denied on the condition that the defendant consent to a specified increase of the award.

150 Fed. R. Civ. P. 59(a).

151 Atkinson v. Dixie Greyhound Lines, 143 F.2d 477 (5th Cir. 1944) and Atlantic Coast Line R. Co. v. Bennett, 251 F.2d 234 (4th Cir. 1958).

152 Haug v. Grim, 251 F.2d 523 (8th Cir. 1958) and Southern Ry. Co. v. Madden, 235 F.2d 198 (4th Cir. 1956).

153 Yates v. Dann, 11 F.R.D. 386 (D.C. Del. 1951).

154 Tompkins v. Pilots Ass'n for Bay and River Deleware, 32 F. Supp. 439 (D.C. Pa. 1940) and Twenty-One Mining Co. v. Original Sixteen To One Mine, 265 F. 469 (9th Cir. 1920) which was prior to the adoption of Federal Rule 59.

The practice of increasing the amount fixed by the verdict of a jury in an action at law was recognized, though seldom exercised, at common law.[155] The first additur cases appeared in this country after the Civil War[156] and the procedure has been upheld in the majority of cases wherein it has been considered.[157] However, in most of those cases upholding the use of an additur the damages were ascertainable by a fixed formula or were uncontested. In this area of liquidated damages it is argued that the additur order does not usurp the function of the jury's fact finding power as there is only one amount of damages permissible under the evidence. Thus, since defendant has been found liable, neither he, nor the plaintiff, is prejudiced because of the additur. Those cases which uphold the trial court's additur order in unliquidated personal injury actions are much less numerous.[158]

A large portion of the difficulty has arisen from a failure to distinguish between additur cases where the verdict is increased over the objection of one of the parties and those in which it is not, either because no one objects or because the party objecting to the increase is given the option of accepting it or having a new trial. Obviously, only the former group of cases fairly present the question of the propriety of the additur practice. The cases in the latter group either involve the application of conventional

155 Brown v. Seymour, 1 Wils. 5 (1742). The additur power was exercised affirmatively in Burton v. Baynes, Barnes Practice Cases, 153 (1733). See the excellent historical discussion of this remedy in Dimick v. Schiedt, 293 U.S. 474 (1934).

156 Carr v. Minor, 42 Ill. 179 (1866) and James v. Morey, 44 Ill. 352 (1867).

157 *Alabama*: Kiaas v. American Bakeries Co., 231 Ala. 278, 164 So. 565 (1935); *Delaware*: Rudnick v. Jacobs, 9 Harr. 169, 197 Atl. 381 (1938); *Georgia*: E. Tis Napier Co. v. Gloss, 150 Ga. 561, 104 S.E. 230 (1920) (additur granted on defendant's counterclaim); *Illinois*: Carr v. Minor and James v. Morey, *supra* note 156; *Massachusetts*: Clark v. Henshaw Motor Co., 246 Mass. 386, 140 N.E. 593 (1923) where the refusal of the trial court to grant a new trial was upheld where defendant stipulated to an increase in the judgment; *New Jersey*: Gaffney v. Illingsworth, 90 N.J.L. 490, 101 Atl. 243 (1917); *Washington*: Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924). A special rule is announced in *Wisconsin* where it is held that the court can use the additur if defendant consents to pay the largest amount which a jury *could assess under the proof*, even without plaintiff's consent. See Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 274 (1927).

158 Gaffney v. Illingsworth, *supra* note 157, and Clausing v. Kershaw, *supra* note 157. See Lemon v. Campbell, 136 Pa. Super. 370, 7 A.2d 643 (1939) and Lorf v. City of Detroit, 145 Mich. 265, 108 N.W. 661 (1906) where the use of an additur in cases of unliquidated damages was unconditionally denied.

principles of waiver or a situation where the additur, by its own terms, does not take effect. Illustrative of basic waiver situations are: (1) cases where both parties assent to an additur which unconditionally increases the verdict and makes no provision for a new trial; (2) cases where a new trial is ordered unless both parties agree to an increase in the verdict and both do agree; and, (3) cases where a new trial is ordered unless defendant agrees to an increase in the verdict, defendant does agree and plaintiff, failing to object, accepts the increased verdict. Such cases, in effect, involve no more than voluntary settlements between the parties which would have almost certainly taken place without any action by the court. The court's action, while harmless, is also largely superflous. The typical situation where the additur, by its own terms, does not take effect is presented by an order granting a new trial unless defendant agrees to an increase in the verdict, defendant refuses to agree, and a new trial follows as a matter of course. Here the additur is entirely superflous and the only question is whether plaintiff is entitled to a new trial.

The only additurs not open to a charge of superfluousness are those whose effect is to increase the verdict *over the objection of one of the litigants.* The problem is two-fold: When may the verdict properly be increased over the objection of defendant and when over the objection of plaintiff? In order to avoid misunderstanding, the typical procedural setting where defendant objects is as follows. The jury returns an inadequate verdict. Plaintiff moves for a new trial or requests an additur and the trial court issues an order whose effect is to require defendant to pay plaintiff an amount larger than the amount of the jury's verdict. The order gives defendant no option of refusing to pay and having a new trial. Defendant, it should be noted, may or may not want the verdict set aside and a new trial granted. The question of whether he is entitled to such relief is not discussed here. Obviously, if defendant is entitled to a new trial plaintiff is not entitled to an additur over the objection of defendant. The situation here is that defendant is either unable or unwilling to have the verdict set aside on his own motion and objects to being absolutely required to pay plaintiff an amount larger than the jury's verdict.

Policy-wise, it seems clear that plaintiff should never be allowed an additur over the objection of defendant where the inadequacy of the verdict may have resulted from juror doubt over defendant's liability. For to do so would give plaintiff something the jury never intended that he should have. At most, then, we can only be concerned with the relatively infrequent instances where the evidence as to liability clearly preponderates for plain-

tiff and/or there are other circumstances strongly suggesting that the inadequacy of the verdict was attributable to some other cause other than juror doubt over defendant's liability, *i.e.*, circumstances showing that the jury *in fact* found that defendant was liable.

But there will ordinarily be a serious problem with reference to the use of the additur even in this relatively narrow body of cases. The typical case is one involving unliquidated damages where it is impossible to accurately say what the jury should have awarded in damages. The permissible range of variance will often be in the thousands or even in the tens of thousands. There is, in short, the problem that the jury has not awarded plaintiff enough but that we do not know what "enough" is and that to let the trial judge decide over defendant's objection is to permit him to substitute his own judgment for that of a jury.

The most apparent obstacle to any form of compulsory additur lies in the Seventh Amendment to the United States Constitution and the various constitutional limitations upon right to a jury trial within each state. The leading case on this subject is *Dimick v. Schiedt*,[159] which held that a federal court could not increase a jury's award without the consent of *both* parties. It was pointed out that any attempt by the court to fix damages over plaintiff's objection constituted a violation of the Seventh Amendment. The most recent state court opinion dealing with the constitutional aspects of the additur is the California case of *Dorsey v. Barba*,[160] which held that a denial of plaintiff's motion for a new trial conditioned on defendant's consent to an increase in the amount of damages constituted an impairment of plaintiff's constitutional right to a jury trial. The opinion dealt with Article I, Section 7 of the California Constitution which was interpreted much the same as the Seventh Amendment to the United States Constitution. Both the *Dimick* and *Dorsey* cases have been soundly, and somewhat unjustly, criticized by the commentators with some calling for constitutional amendments to counteract their effect.

Very few additur cases have arisen where plaintiff's right to a jury determination of unliquidated damages was at issue, however, it would seem that if any form of compulsory additur exists there is a definite violation of either party's right to a bona fide

[159] Dimick v. Schidt, 293 U.S. 474 (1934). But see United States v. Kennesaw Mountain Battlefield Ass'n, 99 F.2d 830 (5th Cir. 1938) which distinguished the Dimick case and sustained the use of additur in a condemnation proceeding.

[160] Dorsey v. Barba, 38 A.C. 402, 240 P.2d 604 (1952).

trial on the issue of liability. This results in a deprivation of that party's constitutional right to trial by jury whether under the Seventh Amendment to the United States Constitution or under the various state constitutional provisions providing that the right of trial by jury shall be secured to all and remain inviolate. It has been argued by proponents of the constitutional validity of the additur order that at common law, redetermination of damages by a new jury was unknown and that, therefore, one jury verdict satisfies the constitutional guarantee.[161] This argument is clearly defective and should not prevail. If the jury verdict were allowed to stand there would be no constitutional violation; however, the exercise of the additur privilege causes this one verdict to be without effect. The damages are determined by the trial court and the complaining party has not received even *one* jury verdict on this question.

What could be the most important argument in opposition to the use of the additur has been, apparently, overlooked in the opinions and by all commentators on the subject. This important point lies in the fact that every time an additur order is used or upheld there is a sanction of the compromise verdict. Presumably, every case in which an additur might be used is one where the verdict is substantial though inadequate and the result of a compromise. There seems to be little doubt that the additur should not be allowed to prevail in the nominal verdict situation as such a verdict is, in the vast majority of jurisdictions, recognized as a finding for the defendant. Therefore, where liability has been compromised, in the substantial though inadequate case, an adoption of the additur as an additional mechanism for correcting an inadequate verdict does nothing more than add to a verdict which should only be reversed. There has never been a conclusive determination of liability in these cases and without such a determination no adequate award of damages should be attempted.

One further argument in favor of the additur is advanced. This is based on the theory that additur and remittitur are not substantially distinguishable and if remittitur is sound it follows that additur should also prevail. While it is true that the practice of remittitur is universally accepted, it does not logically follow that additur should also become so accepted. In remittitur cases the verdict is excessive and there appears to be a presumption that the jury has made a valid finding on liability. It is quesitonable

[161] See dissent of Justice Stone in Dimick v. Schiedt, *supra* note 159 and dissent of Justice Traynor in Dorsey v. Barba, *supra* note 160. See also: Note, 33 MICH. L. REV. 138, 140 (1933).

whether an excessive verdict would result where there was any juror doubt on liability. The one exception to this might be where the damages were "monstrous" and so high that it was clear that the jury allowed passion and prejudice to guide their actions to such an extent as to interfere even with the issue of liability. However, this exception will very rarely arise and the excessive verdict can usually be said to conclusively establish the question of defendant's liability. In this instance a reasonable argument might be made that the parties are not being deprived of a jury trial on the issue of liability and, hence, a remittitur should be allowed. However, this argument has absolutely no merit in the additur situation where the original award is more than likely a compromise in itself.

In conclusion it is apparent that any form of compulsory additur will result in a violation of the constitutional safeguard of trial by jury. Whether it be compulsory additur for both parties or where the consent of only one party is required, there is a violation of someone's right to a bona fide trial on the issue of liability. If both parties agree to an increase, thereby waiving their right to object, there is, in effect, nothing more than a voluntary settlement and this cannot rightfully be classified as an additur situation. The additur order is the most unfair and unsatisfactory of all mechanisms for correcting an inadequate verdict. Such a procedure should not be adopted as it dispenses with any jury determination of liability and damages and represents nothing more than a judicial determination of these questions in direct conflict with the constitutional provisions safeguarding the right to trial by jury, to say nothing of the extent to which compromise verdicts are sanctioned by its unjustifiable usage.

VII. CONCLUSION

It has been the purpose here to point out the importance of having a uniform set of rules both in the state courts and in the federal judicial system upon which to base the trial court ruling on a motion for new trial due to inadequacy of damages awarded. It is clear that state appellate courts have gone a long way in formulating a definite set of principles delineating when trial judges must grant or deny a new trial for inadequacy. The federal courts, on the other hand, have done almost nothing to guide federal district judges in this matter. Furthermore, the federal courts have not advanced to the point where they draw the important distinction between nominal verdicts and those which are substantial though clearly inadequate. The *Fairmount* and *Caloric* cases have created an obstacle that must be removed. A nominal

verdict, as discussed herein, should always be interpreted as a perversely-expressed finding for defendant while the substantial though inadequate verdict should be governed by those four classes of cases in jurisdictions which examine the evidence as to defendant's liability prior to ruling on the motion. In all of these cases the appellate courts should re-examine the evidence on liability and the four rules discussed herein should serve as invaluable guides to trial judges when ruling on new trial motions grounded upon inadequacy of damages awarded.

Where the plaintiff wishes to retain the benefits of the jury's finding in his behalf regarding liability there are two possible mechanisms at his disposal. These are the additur and a partial new trial limited only to the issue of damages. It has been submitted that the additur is nothing more than an overrated and misunderstood device which, *when used within constitutional limitations,* is of extremely limited usefulness. The partial new trial, on the other hand, can be a very useful mechanism. However, it should be used with extreme caution and never in a situation where there is an inference of a compromise or unsatisfactory proof of liability.

With the emphasis now being put upon the size of verdicts, appellate courts will be confronted with a growing number of cases calling for review of a ruling on the motion for new trial based upon inadequacy of damages awarded. The increase in these cases makes apparent the need for a uniform set of rules in this area. It is hoped that this discussion points out those needs and that the suggestions included assist in some degree toward classification of the law relative to inadequate verdicts.